

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EARNEST FLAGG, as Next Friend of
JONATHON BOND,

Plaintiff,

vs.

Case No. 05-CV-74253-DT
Hon. Gerald E. Rosen
Magistrate Judge Steven R. Whalen

CITY OF DETROIT, a Municipal Corporation,
CITY OF DETROIT CHIEF OF POLICE, Ella Bully-Cummings
DEPUTY CHIEF OF POLICE, Cara Best,
JOHN DOE OFFICERS 1 -20,
ASSISTANT DEPUTY POLICE CHIEF Harold Cureton,
Commander Craig Schwartz,
Lieutenant Billy Jackson,
Mayor Kwame Kilpatrick, and
Christine Beatty, Jointly and Severally,

Defendants

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**DEFENDANT KWAME M. KILPATRICK'S NOTICE OF JOINDER AND
MEMORANDUM IN SUPPORT OF DEFENDANT CITY OF DETROIT'S AMENDED
EMERGENCY MOTION TO STAY CIVIL PROCEEDINGS AND MOTION FOR
ISSUANCE OF "GAG" ORDER**

NOW COMES Defendant, KWAME KILPATRICK, by and through his attorneys, James C. Thomas and Joseph A. Niskar, and in join in the City of Detroit's Amended Emergency Motion to Stay Civil Proceedings and Motion for Issuance of "Gag" Order, states as follows:

1. Plaintiff sues Mr. Kilpatrick as Next Friend of the son of Tamara Bond Greene, who was unfortunately killed by an unknown individual in 2003.
2. Plaintiff alleges that a party occurred at the Manoogian Mansion that was attended by Mr. Kilpatrick, his friends, Detroit Police Officers and Ms. Greene.
3. Plaintiff claims are grounded in his belief that the City of Detroit Police Department failed to investigate the murder of Ms. Greene.
4. Plaintiff alleges that the above named Defendant prevented the investigation from going forward and seeks damages.
5. As this Honorable Court is surely aware, there has been unprecedented media coverage surrounding this matter. Local, national and international media outlets spanning print, television, radio, and the internet have engaged in persistent and relentless coverage of this matter.

6. Rule 3.6 of the American Bar Association's Model Rules of Professional Conduct governs Trial Publicity. Rule 3.6(1) requires a “substantial likelihood of materially prejudicing an adjudicative proceeding.”
7. Comment 1 of Rule 3.6 states that “Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence.”
8. In the seminal case *Gentile v. State Bar*, 501 U.S. 1030 (1991) the Court upheld the “substantial likelihood test” which imposes narrow and necessary limitations to lawyers' speech. The Court reasoned:

the limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial jurors, and an outcome affected by extra judicial statements would violate that fundamental right.” *Id.* at 1075.
9. The United States Eastern District Court of Michigan approved the use of a protective order last month in *U.S. v. Fieger*, 2008 WL 659767 (E.D. Mich., 2008) Judge Borman held that “it is undisputed that the Supreme Court has held that a party's free speech may be prohibited to the extent that the speech presents a 'substantial likelihood of materially prejudicing' a fair trial.” *Citing Gentile v. State Bar of Nevada*, 510 U.S. 1030, 1063 (1991).
10. This Honorable Court implemented a protective order as recently as 2004 in the

Koubriti matter. In its findings, this Honorable Court stated “As the Supreme Court has repeatedly observed, intense publicity surrounding a criminal proceeding poses significant dangers to a fair trial.” *U.S. v. Koubriti*, 307 F. Supp.2d 891, 897 (E.D. Mich., 2004); citing *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941); *Patterson v. Colorado*, 205 U.S. 454 (1907).

11. In *Koubriti*, this Honorable Court recognized that “trial courts have 'an affirmative constitutional duty' to minimize the potential for prejudicial pretrial publicity.” *Id.*
12. In this matter, there has been an unrelenting onslaught of intense publicity. Media reports concerning the tragic demise of Ms. Greene are full of sensationalism, innuendo and speculation. Counsel for the Plaintiff has been unrelenting in their attempts to publicize themselves and, in some instances, completely inaccurate information without a cursory regard for the truth. This Court in *Koubriti* fashioned a narrowly tailored, yet effective protective order. Mr. Kilpatrick urges that a similar order would be appropriate in this matter in order to safeguard fairness in his trial.

WHEREFORE, it is requested that this Honorable Court institute a protective/gag order to preserve the Defendants' constitutional right to a fair and impartial jury trial in this matter.

Respectfully Submitted,

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Dated: April 11, 2008

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2008, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to all parties of record.

/s/ James C. Thomas
James C. Thomas